Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DAYTON NEWSPAPERS, INC.,
Petitioner,

v.

GENERAL TRUCKDRIVERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS
LOCAL UNION NO. 957,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CHARLES B. FOX, ESQ. *
JAMES M. HILL, ESQ.
O'DIAM, MCNAMEE & HILL
2371 LAKEVIEW DRIVE
BEAVERCREEK, OH 45431-3696
(937) 427-1367

Attorneys for Petitioner

* Counsel of Record

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

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QUESTIONS PRESENTED

Whether an arbitrator exceeds his or her authority, or adds to, detracts from or modifies a collective bargaining agreement, by completely substituting his or her own notions of fairness and equity for an employer's express contractual management rights and right to institute and enforce work rules and policies when determining whether an employee was terminated for "just cause."

Whether an arbitrator exceeds his or her authority, or adds to, detracts from or modifies a collective bargaining agreement, by considering his or her own notions of fairness and equity, without acknowledging or considering in any way an employer's express contractual management rights and right to institute and enforce work rules and policies when determining whether an employee was terminated for "just cause."

Whether an arbitrator is required to reach a conclusion supported by his own factual findings.

Whether an arbitration award that condones and excuses an assault and sexual harassment in the workplace violates public policy such that it should be vacated.

PARTIES TO THE PROCEEDING

Petitioners

Dayton Newspapers, Inc. is not a subsidiary or affiliate of a publicly-owned corporation. There is no publicly-owned corporation that has a financial interest in the outcome of this matter. Dayton Newspapers, Inc. is a subsidiary of Cox Newspapers, Inc. Cox Newspapers, Inc. is a subsidiary of Cox Enterprises, Inc.

Respondents

General Truck Drivers, Chauffeurs, Warehousemen and Helpers Local Union No. 957 is affiliated with the International Brotherhood of Teamsters.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 190 F.3d 434 (1999). A copy of the Opinion is included in the Appendix at Appendix A at 1a-29a. The Opinion of the United States District Court for the Southern District of Ohio, Western Division is unreported. A copy of the Opinion is included in the Appendix at Appendix C at 32a-53a. A copy of the Arbitration Award is included in the Appendix at Appendix D at 54a-65a.[1]

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its Opinion on August 19, 1999. This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S. C. §§ 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Arbitration Act
9 U.S.C. § 10(a)(4)

§ 10. Same; vacation; grounds; rehearing

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[1] Citations to "App." are to the appendix filed with this Petition for Writ of Certiorari pursuant to Supreme Court Rule 14(i).

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration–

* * *

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

* * *

STATEMENT OF THE CASE

This appeal arises from an arbitration award ("the Arbitration Award") reinstating Rick Elliott ("Elliott"), an employee of Defendant/Appellee, Dayton Newspapers, Inc. ("DNI"). It is the position of DNI that the arbitrator, Edward P. Goggin ("the Arbitrator"), exceeded his authority in ordering reinstatement of Elliott under the parties' Collective Bargaining Agreement ("CBA") and DNI's binding posted work rules and regulations ("the DNI Rules"). The Arbitration Award is not supported by the arbitrator's own findings or the record in this case. The Arbitration Award also conflicts with public policy regarding the termination of employees that engage in violent conduct and sexual harassment in the workplace. The United States District Court for the Southern District of Ohio, Western Division ("the District Court") vacated the Arbitration Award. The United States Court of Appeals for the Sixth Circuit ("the Sixth Circuit") reversed, with one of three judges dissenting.

The evidence at the arbitration hearing established that Elliott was a Branch Captain, a supervisory employee in

charge of DNI's Beavercreek, Ohio circulation branch. On February 24, 1996, Elliott physically grabbed Iris Thomas ("Thomas"), a newspaper carrier and independent contractor for DNI, as she was leaving DNI's Beavercreek Distribution Branch, where both were working. This occurred during a confrontation between Elliott and Thomas, who were engaged in an extra-marital relationship. The Arbitrator specifically found in his decision that Elliott approached Thomas from behind as she was leaving the building, grabbed her by the back of the neck and took her out the door, holding her by her hair. Unrefuted evidence was also presented at hearing that as Elliott grabbed Thomas' neck, he loudly and angrily called her a "bitch." At the hearing, it was undisputed that Thomas complained about Elliott's use of violence and verbal abuse against her to DNI and also filed criminal charges against Elliott.

It was uncontroverted that DNI in 1995 established a policy of "zero tolerance" for violence in the workplace. At the hearing, Brett Thurman, DNI's General Counsel and Human Resource Manager, as well as two other DNI employees, testified that this policy mandated termination in all cases of workplace assault or violence. Further, Article 11, Section 3 of the CBA expressly authorizes DNI to institute and enforce rules and regulations and provides that "all employees shall be subject to such rules and regulations." The DNI Rules were presented as evidence at the hearing in this case. There was also undisputed evidence that these rules were posted at DNI and there was no evidence that Elliott was unaware of these rules. It was also undisputed that the DNI Rules are incorporated by the CBA and give DNI the sole right to determine what constitutes unacceptable conduct at DNI and to determine the appropriate remedy for unacceptable conduct. The DNI Rules specifically define unacceptable conduct to include the following:

6. By word or action discredit or bring reproach upon co-workers or others on the basis of their race, religion, national origin, disability or sex.

7. Assault or the use of profane, abusive or threatening language toward fellow employees or supervisory personnel.

The DNI Rules specifically state that "[f]orms of discipline which the Company may utilize include, but are not limited to, reprimand suspension or termination." Further, the DNI Rules state that "[t]he Company may impose any form of discipline up to and including immediate discharge, that it deems to be appropriate."

Pursuant to the DNI Rules and its "zero tolerance" policy, DNI terminated Elliott's employment for inflicting violence upon and verbally abusing Thomas, a co-worker with whom he was having an extra-marital affair. Pursuant to the CBA, Elliott filed a grievance contesting his termination. The grievance proceeded to arbitration on September 20, 1996 and the Arbitrator issued an award in favor of Elliott on December 19, 1996. The Arbitrator determined that DNI did not have just cause for terminating Elliott, concluding that his actions were not sufficiently violent to justify discharge. The Arbitrator completely failed to acknowledge or address DNI's management rights, posted work rules and zero tolerance policy for assaults in the workplace. The Arbitrator also failed to impose any alternative sanctions upon Elliott for his assault upon Thomas. Subsequent to the hearing, the Arbitrator, without notice to any party, destroyed the arbitration record.

On March 22, 1996, Elliott filed an application with the Ohio Bureau of Employment Services ("OBES") for unemployment compensation. After a hearing on June 27, 1996, the OBES ruled on July 3, 1996 that Elliott was discharged by DNI for just cause, even under the lax standards for unemployment compensation, because the evidence established that as Thomas was leaving DNI's Beavercreek Distribution Branch, Elliott, acting in his supervisory capacity, grabbed her by the hair on the back of her head.

On March 24, 1997, DNI filed a Motion To Vacate or Modify Arbitration Award in the Common Pleas Court of Montgomery County, Ohio. The Union subsequently initiated a separate Complaint in the District Court seeking to enforce the Arbitration Award. The Union removed the state court action on April 23, 1997. The two actions were consolidated by the District Court on September 3, 1997. On February 23, 1998, the District Court entered a Decision and Order, and a Judgment, granting DNI's Motion for Summary Judgment, denying the Union's Motion for Summary Judgment, and vacating the Arbitration Award. On March 9, 1998, the Union filed a Motion to Alter or Amend Judgment. On April 21, 1998, the District Court denied this Motion.

The Union filed an appeal with the Sixth Circuit. On August 19, 1999, the Sixth Circuit reversed the District Court[2], with one of three judges dissenting. As set forth below, this decision is completely contrary to the decisions of at least one other circuit.

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[2] The Sixth Circuit recommended "full-text publication" of its Opinion and it is found at 190 F.3d 434.

ARGUMENT FOR GRANTING WRIT

It is the position of DNI that the Arbitration Award reinstating a supervisory employee who was discharged for assaulting and sexually harassing, in the workplace, a female co-worker with whom he was having an extra-marital affair, should be vacated. Specifically, it is the position of DNI that the Arbitration Award is in violation of the parties' collective bargaining agreement, and contrary to public policy.

The Arbitrator exceeded his authority in reinstating Elliott in violation of the parties' CBA and DNI's binding posted work rules and regulations. The CBA gave DNI the specific right to "institute and enforce" rules. However, the Arbitrator completely ignored DNI's management rights in favor of his "own brand of industrial justice." The Arbitration Award is also not supported by the Arbitrator's own factual findings.

The basis for the Arbitration Award reinstating Elliott appears to be that while the Arbitrator determined that Elliott did commit an assault against a co-worker, Thomas, this assault was not violent enough, and Thomas "deserved" such treatment, and thus, DNI did not have just cause for terminating Elliott.

Further, the Arbitration Award conflicts with public policy regarding the termination of employees that engage in sexual harassment and violent conduct in the workplace by holding that unless such harassment or assault is sufficiently damaging to the victim, and unless the victim didn't "deserve" such treatment, it is not just cause for termination. Specifically, the Arbitration Award requiring DNI to retain Elliott, despite the undisputed acts of violence he committed, forces DNI to violate public policy against permitting

violence in the workplace and an employers' failure to address situations where employees commit violence and sexual harassment in the workplace.

ARGUMENT I

The Arbitrator exceeded the express limitations of his contractual mandate; added to, detracted from and modified the parties' Collective Bargaining Agreement; and the Arbitration Award is not supported by the Arbitrator's own factual findings.

The Arbitrator exceeded the express limitations of his contractual mandate in reinstating Elliott. Specifically, the Arbitrator disregarded the terms of the CBA by completely ignoring the management rights and DNI work rules that are expressly made binding by the CBA. The District Court properly determined that the Arbitration Award should be vacated. The District Court ruled that the Arbitrator exceeded his authority by ignoring the CBA and DNI Rules; added to or modified the DBA by applying his own standard of "work place violence"; and ignored his own factual findings by concluding that Elliott did not engage in that "workplace violence." (App. C at 50a-52a).

1. The Arbitrator exceeded his authority and added to, detracted from and modified the parties' Collective Bargaining Agreement.

While it is well-established that an arbitrator's decision is to be given considerable deference, a collective bargaining agreement circumscribes the arbitrator's jurisdiction. Bruce Hardwood Floors v. UBC, Southern Council of Indus. Workers, Local Union No. 2713, 103 F.3d 449, 452 (5th Cir. 1997); Delta Queen Steamboat Co. v. District 2 Marine

Eng'rs. Beneficial Ass'n., 889 F.2d 599, 602 (5th Cir. 1989). Thus, the deference granted to an arbitrator by a district court is *not* to be construed as a "grant of limitless power." Leed Architectural Prods. v. United Steelworkers of Am., Local 6674, 916 F.2d 63, 65 (2d Cir. 1990).

A district court may vacate an arbitration award for various reasons outlined in 9 U.S.C. § 10(a), including cases where the arbitrator exceeded his or her authority. Torrington Co. v. Metal Prods. Workers Union Local 1645, 362 F.2d 677, 680, n. 5 (2d Cir. 1966). [3]An arbitration award is valid only if it "'draws its essence from the collective bargaining agreement,' and is not merely [the arbitrator's] own brand of industrial justice." United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 36 (1987) (quoting United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960); *See also* Detroit Coil Co. v. International Ass'n of Machinists & Aerospace Workers, Lodge No. 82, 594 F.2d 575, 579 (6th Cir. 1979). An arbitrator is "confined to the interpretation and application of the collective bargaining agreement, and although he may construe ambiguous contract language, he is without authority to disregard or modify plain and unambiguous provisions." (emphasis added). Id. at 579; *See also* Dobbs, Inc. v. Local No. 614 Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am., 813 F.2d 85, 86 (6th Cir. 1987). There is a departure from the essence of the agreement if:

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[3] 9 U.S.C. § 10(a) authorizes an order vacating an arbitration award where "the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."

> (1) an award conflicts with express terms of the collective bargaining agreement, (2) an award imposes additional requirements that are not expressly provided in the agreement, (3) an award is without rational support or cannot be rationally derived from the terms of the agreement, and (4) an award is based on general considerations of fairness and equity instead of the precise terms of the agreement.
>
> . . .

Cement Divisions, Nat'l Gypsum Co. v. United Steelworkers of Am., 793 F.2d 759, 766 (6th Cir. 1986) (emphasis added) (citations omitted). Further, "the award must, in some logical way, be derived from the wording or purpose of the contract." Bruce, 103 F.3d at 452 (emphasis added); Delta Queen, 889 F.2d at 602. Where an arbitrator exceeds the express limitations of his contractual mandate, judicial deference ends and a vacatur or modification of the award is appropriate. Bruce, 103 F.3d at 452; Executone Information Sys., Inc. v. Davis, 26 F.3d 1314, 1325 (5th Cir. 1994).

Accordingly, federal courts, including the Sixth Circuit until the instant case, have acknowledged that an arbitration award should be vacated where the collective bargaining agreement expressly recognizes the right of the company to implement and enforce its own work rules and the arbitrator has attempted to circumscribe this right. Bandag, Inc. v. Local 922, United Steelworkers of Am., 1997 WL 436698 (4th Cir. Aug. 5, 1997); Mountaineer Gas Company v. Oil, Chem. & Atomic Workers Int'l. Union, 76 F.3d 606, 610 (4th Cir. 1996); Dobbs, 815 F.2d at 817; *See also* United Paperworkers Int'l. Union v. Wheaton Indus., 811 F.2d 608 (6th Cir. 1986); Buckeye Cellulose Corp. v. District 65, Div. 19, U.A.W., 689 F.2d 629 (6th Cir. 1982);

International Bhd. of Firemen and Oilers, AFL-CIO v. The Nestle Co., 630 F.2d 474 (6th Cir. 1980); Amanda Bent Bo!t Co. v. International Union, United Automobile, Aerospace, Agricultural Implement Workers of Am., 451 F.2d 1277 (6th Cir. 1971); Local 342, U.A.W. v. T.R.W., Inc., 402 F.2d 727 (6th Cir. 1968).

Where rules or policies are promulgated pursuant to authority granted by a collective bargaining agreement, such rules or policies have the force of contract. Mountaineer Gas, 76 F3d at 610; General Drivers, Warehousemen & Helpers Local Union 968 v. Sysco Food Services, Inc., 838 F.2d 794, 799 n. 4 (5th Cir. 1988).

The United States Court of Appeals for the Fourth Circuit ("the Fourth Circuit") has expressly noted the impropriety of having an arbitrator "second guess" an employer where that employer is expressly given the right to manage its employees in the parties' collective bargaining agreement:

> The reservation of a right to either discipline or discharge for cause would be wholly ineffective and meaningless if the employer's action, pursuant to such right, is subject to review by an arbitrator on the basis of appropriateness. If the reserved right is construed to mean that the employer can take no disciplinary action in excess of a reprimand, except at its own risk and subject to severe penalties in case an arbitrator should later be of the opinion that some milder action is appropriate, the effect would be that the employer's inherent right which has not been

> expressly relinquished by contract is no right at all.

Textile Workers Union of Am. v. American Thread Co., 291 F. 2d 894, 899 (4th Cir. 1968)(emphasis added); *See also* Nestle, 630 F.2d at 477 ("[the agreement] needs no interpretation and we find no provision in it giving the arbitrator power to prescribe the penalty for violation of the collective bargaining agreement or to control the exercise of it by the employer. This power was vested solely in the employer.")(emphasis added); Dobbs, 815 F.2d at 87 (court affirming vacation of arbitration award where arbitrator ignored provision in agreement giving company the right to "discipline and to enforce working rules . . ."). In accordance with the foregoing policy, the Fourth Circuit has specifically upheld an employer's right to implement and enforce policies where the collective bargaining agreement provides it with such powers, and held that an arbitrator may not circumvent that right by virtue of broad "proper cause" language:

> Contrary to the Union's contention, we find that the Drug Policy was to be interpreted and enforced in accordance with the CBA. A valid and proper policy promulgated by an employer pursuant to a collective bargaining agreement is enforceable; it need not be specifically incorporated by reference into the collective bargaining agreement. Consequently, when the collective bargaining agreement reserves to management the right to make and enforce disciplinary rules, any rules or policies promulgated in accordance with that authority are thus incorporated into the collective

bargaining agreement and have the force of contract language.

The CBA gave Mountaineer the requisite authority to enforce the Drug Policy and to discharge Watson for violating the Drug Policy. The arbitrator's role clearly prohibited him from amending, adding to, or subtracting from the CBA. Therefore, by converting Watson's permanent discharge into a disciplinary suspension, the arbitrator did not do his job. Instead, the arbitrator blatantly ignored the unambiguous language of the Drug Policy and fashioned a modified penalty that appealed to his own notions of right and wrong. We agree with the district court's holding that the arbitrator lacked the authority to create an individualized exception to the strict application of the Drug Policy. And the words "proper cause" of the CBA cannot be the loophole through which the arbitrator bypasses the Drug Policy's mandatory language to implement his own brand of industrial justice. In reinstating Watson, the arbitrator illegally created an exception to the strict application of the Drug Policy's mandatory termination. By fashioning an entire new remedy and infusing his personal feelings and sense of fairness into the award, the arbitrator created an award that failed to draw its essence from the CBA, which clearly reserved to Mountaineer the right to promulgate and enforce such drug policies.

Mountaineer Gas, 76 F.3d at 610 (emphasis added); *See also* Bandag, Inc. v. Local 922, United Steel Workers of America, No. 5: 96-CV-450-BR-3, slip op. (E.D.N.C. December 19, 1996)

The Sixth Circuit's opinion in this case is completely contrary to the foregoing authority. The Arbitrator completely ignored the undisputed conduct as applied to the undisputed rules. The CBA, states in no uncertain terms that:

> [t]he arbitrator shall have no power to change, modify, add to or detract from any terms of the contract.

Further, the CBA provides:

> The Company shall have the right at any time to promulgate and enforce rules and regulations and all employees shall be subject to such rules and regulations.

The DNI Rules were admitted into evidence at the hearing in this case without objection, and there was undisputed testimony that such rules were posted at DNI.[4]

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[4] Again, the DNI Rules specifically define unacceptable conduct to include the following:

> 6. By word or action discredit or bring reproach upon co-workers or others on the basis of their race, religion, national origin, disability or sex.
>
> 7. Assault or the use of profane, abusive or threatening language toward fellow employees or supervisory personnel.

DNI also explained at the arbitration, through three witnesses, that it uniformly required termination in all cases of assault and violence in the workplace. Even though none of this evidence was disputed, the Arbitrator refused to recognize DNI's management rights at all, ignored his own finding of an assault by Elliott and chose to apply no discipline at all. He very clearly has "dispensed his own brand of industrial justice," and therefore the Arbitration Award should not stand.

Here, the Arbitrator specifically found that Elliott had an extramarital relationship with Thomas. Further, the Arbitrator specifically found that during a confrontation with Thomas that arose from this relationship, at the DNI facility, Elliott came up behind Thomas as she was leaving and grabbed her neck and hair and forced her out the door. At the hearing, it was undisputed that Elliott loudly and angrily called Thomas a "bitch" during this altercation. [5] Thus, there is no question that Elliott engaged in conduct in violation of the DNI Rules.

In essence, the Arbitrator determined that while Elliott did engage in harassment, an assault and verbal abuse of

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The DNI Rules specifically state that "[f]orms of discipline which the Company may utilize include, but are not limited to, reprimand, suspension or termination." Further, the DNI Rules state that "[t]he Company may impose any form of discipline up to and including immediate discharge, that it deems to be appropriate."

[5] It is also uncontradicted that evidence was presented during the hearing that during this confrontation, Elliott told yet another co-worker, who was concerned about the situation, to "stay the hell out of it."

Thomas, all in violation of DNI's posted work rules and "zero tolerance" policy, it was not "workplace violence" and was either justified because of the degree of force used and harm inflicted, or, rather shockingly, because Thomas somehow "deserved" such treatment. [6]

However, as recognized by the District Court, these criteria are not a part of the CBA, or the DNI Rules. They are self-imposed by the arbitrator, and such modification and expansion is clearly in violation of § 11.4 of the CBA.

Similarly, the DNI Rules prohibit the use of words and actions discrediting co-workers "or others" on the basis of their race, religion, natural origin, disability or sex. It was absolutely undisputed at the hearing that Elliott angrily called Thomas a "bitch" during their altercation, and that under the company rules this alone would permit termination.

In this case, the Sixth Circuit has apparently determined that, despite the rights expressly delegated to DNI under the CBA, the Arbitrator has the absolute and unfettered authority to interpret just cause, not in conjunction with the CBA and the DNI work rules, but in any way he sees fit! What the Sixth Circuit has failed to explain is how such a determination can be logically derived from the CBA.

It would be a ludicrous proposition to give DNI the right to "promulgate and enforce" rules, as expressly provided in the CBA, then allow an arbitrator to "second guess" DNI's authority and decisions. This would, of course,

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[6] However, the Arbitrator did not find that Elliott grabbed the back of Thomas' neck in self-defense.

render the delegation of the right to "promulgate and enforce" rules absolutely meaningless. Clearly, the plain meaning of these provisions is to allow DNI to prescribe the conduct of its employees through its rules, which it may "promulgate and enforce."

However, the Opinion of the Sixth Circuit fails to disclose any limitations on an arbitrator to circumvent such management rights, not even the usual admonishment against an arbitrator dispersing his own "brand of industrial justice" or basing an award on "general considerations of fairness." Because the Arbitrator, and now the Sixth Circuit, have failed to apply, or even acknowledge, DNI's management rights under the CBA, this Court should now decide how an Arbitrator's discretion and an employer's express management rights must coincide. The United States Court of Appeals for the Fourth Circuit has clearly determined that a "just cause" provision cannot serve as a "loophole" through which an arbitrator bypasses an employer's express management rights. Mountaineer Gas, 76 F.2d at 608. In this case, the Sixth Circuit has apparently held that there are no restrictions on the authority of an arbitrator if he has the benefit of the "just cause" determination, or at least has provided no guidance as to what such restrictions might be. It is DNI's position that the Arbitrator should not be allowed to "second guess" its express management rights. This view was adopted by the District Court and the dissenting opinion in the Sixth Circuit, and has been adapted by the Fourth Circuit. At the very least, an arbitrator should be required to acknowledge and consider those rights in determining "just cause." The Arbitrator here completely failed to do so.

Accordingly, it is incumbent upon this Court to provide courts and parties with guidance on this issue. The Sixth Circuit decision provides very little help or clarification,

and is contrary to decisions from the Fourth Circuit. Therefore, DNI respectfully requests that its Petition for Writ of Certiorari be granted.

2. The Arbitration Award is not supported by the Arbitrator's own factual findings or the record.

It is well-established that where "the record before the arbitrator reveals no support whatever for his determinations, his award must be vacated." Detroit Coil, 594 F. 2d at 575; *See also* Storer Broadcasting Co. v. American Fed'n of Television & Radio Artists, 600 F. 2d 45, 47 (1979).

In the instant case, the Arbitrator chose to interject his own brand of industrial justice by concluding that Elliott did not engage in "workplace violence." There is no provision in either the CBA or the DNI Rules that even mentions "workplace violence" as a standard to be applied before discipline may be imposed by DNI. Thus, the Arbitrator clearly exceeded his authority in so holding.

Assuming, arguendo, that the Arbitrator properly utilized "workplace violence" as a standard to judge Elliott's conduct, not only does the record fail to support the determination that Elliott did not engage in such violence, but the Arbitrator's own factual findings fail to support this conclusion. This was expressly recognized by the District Court in its Decision:

> In essence, the arbitrator ignored his factual finding that Mr. Elliott had in fact "grabbed [Ms. Thomas] by the back of the neck." Stated differently, his conclusion is not supported by his own factual findings.

(App. C at 51a) (emphasis added). Again, current case law holds that where there is no evidence to support an arbitrator's determinations, the award must be vacated. Storer, 600 F. 2d at 47; Detroit Coil, 594 F. 2d at 575. The Sixth Circuit's opinion would suggest that this is no longer a valid proposition. DNI respectfully requests that the Court determine whether an arbitrator is required to reach a conclusion supported by his own factual findings.

ARGUMENT 2

The Arbitration Award should be vacated in that it violates public.

The District Court properly ordered that the Arbitration Award be vacated. As previously discussed, the primary basis for the District Court's Decision was that the Arbitrator "exceeded his authority" and "created a contract of his own rather than an application of the contract." (App. C at 51a-52a). While DNI certainly agrees with the District Court, it also asserts that the Judgment of the District Court should have been affirmed for alternative reasons as well. *See* City Management Corp. v. U. S. Chem. Co., 43 F.3d 244, 251 (6th Cir. 1994) (Court "may affirm on any grounds supported by the record, even though they may be different from the grounds relied on by the district court.") Specifically, the Arbitration Award violates public policy regarding violence and sexual harassment and in the workplace.[7]

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[7] The Sixth Circuit failed to rule on this argument, even though it was fully briefed by the parties.

Even if an arbitrator acts within his authority in deciding a labor contract dispute, his award will not be enforced if it violates public policy. United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 42 -3 (1987); W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers of Am., 461 U.S. 757, 766 - 67 (1983). If the Arbitrator's interpretation of a collective bargaining agreement "violates some public policy, [the court is] obliged to refrain from enforcing it." Grace, 461 U.S. at 767.

It should be noted that the focus on the "public policy" exception to the general deference afforded arbitration is not upon whether the grievant's conduct violated public policy, but whether the arbitrator's award requiring reinstatement "violates some explicit public policy." Interstate Brands Corp v. Teamsters Local No. 135, 909 F.2d 885, 893 (6th Cir. 1990). The reinstatement itself does not need to necessarily violate "positive law." United Postal Serv. v. American Postal Workers Union, AFL-CIO, 736 F.2d 822, 824 (1st Cir. 1984). The award need only be "inconsistent with public policy." Exxon Shipping Company v. Exxon Seamen's Union, 993 F.2d 357, 363-64 (3rd Cir. 1993).

In the instant case, the Arbitration Award violates the public policies set forth in laws and legal precedent regarding violence and sexual harassment in the workplace.

This Court has never addressed whether there is a public policy against assaults or other violence in the workplace. However, the courts of Ohio have expressly recognized an express public policy against violence in the workplace and in favor of corrective action by employers. In Kerans v. Porter Paint Co., 61 Ohio St. 3d 486, 490-93, 575 N.E.2d 428, 432-33 (1991), the Ohio Supreme Court stated:

> An employer has a duty to provide its employees with a safe work environment and, thus, may be independently liable for failing to take corrective action against an employee who poses a threat of harm to fellow employees, even where the employee's actions do not serve or advance the employer's business goals.

Id. at 493, 575 N.E.2d at 433 (emphasis added).

Courts have also expressly recognized that there is a well-defined and dominant public policy concerning sexual harassment in the workplace. See Stroehmann Bakeries, Inc. v. Local 776, International Bhd. of Teamsters, 969 F.2d 1436, 1441 (3rd Cir. 1992). [8]

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[8] Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-2 (a) (1) (West 1981), prohibits employment discrimination on the basis of sex. The Court has interpreted this prohibition to include sexual harassment in the workplace which has either an economic effect on the complainant, or created "a hostile or offensive work environment." *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64-67 (1986). (emphasis added). The Equal Employment Opportunity Commission (EEOC) has promulgated a regulation that elaborates what constitutes sexual harassment under Title VII:

> Harassment on the basis of sex is a violation of 42 U.S.C.A. § 2000e-2 (a) (1). Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of

In Stroehmann, the court also recognized that in addition to the public policy against sexual harassment in the workplace, there is a well-defined, dominant public policy favoring voluntary employer prevention and application of sanctions against sexual harassment in the workplace. 969 F.2d at 1442.

DNI acted to take steps to implement the foregoing public policies by adopting an internal policy of zero tolerance of violence in the workplace. Further, DNI has express rules forbidding sexual harassment, assault and verbal abuse in the workplace.

However, the Arbitrator completely ignored DNI's management rights and rules, as well as its zero tolerance policy. The Arbitrator specifically found that Elliott grabbed Thomas, a co-worker with whom he was having an extramarital relationship, by the hair and back of the head when she was already on her way out of the building. However, he failed to acknowledge the uncontroverted sexual and verbal abuse in calling her a "bitch." It cannot be denied that the actions of Elliott constituted an assault.

Thus, the Arbitration Award is contrary to well-defined public policy in that it requires employers to wait for broken bones or loss of life before dismissing an employee for

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> such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.

29 C.F.R. § 1604.11(a) (1991) (emphasis added).

assault or sexual harassment. The Arbitration Award permits employee violence and harassment short of serious physical harm and undermines DNI's right and obligation to take preventative measures to eliminate this sort of conduct. It would be ludicrous for an employer, or justice system, to condone an employee physically attacking or using physical force against another worker in the workplace, particularly a worker with whom he has a personal relationship. Moreover, the Arbitration Award places DNI in a paradox by requiring it to maintain Elliott as an employee and face potential liability the next time Elliott assaults someone.[9]

Accordingly, DNI requests this Court to grant its Petition for Writ of Certiorari to determine the public policy considerations of violence and sexual harassment in the workplace in relation to arbitration awards.

CONCLUSION

For the reasons contained herein DNI respectfully requests that this Court grant its Petition for Writ of Certiorari.

The District Court properly exercised its power of review in vacating the Arbitration Award. The District Court properly found that the Arbitration Award did not draw its essence from the collective bargaining agreement, that the

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[9] DNI simply has no desire to defend itself in a lawsuit based upon Elliott's actions by justifying these actions, as the Arbitrator has done, on the basis that the assault was deserved or "not that big of a deal." This situation is particularly problematic where the Ohio Bureau of Employment Services has determined, after a hearing, that Elliott was discharged for just cause and disallowed his claim for benefits.

Arbitrator exceeded his authority, and that the Arbitrator's own factual findings and the record do not support his determinations. Aside from the District Court's reasoning, the Arbitration Award violates public policy by ignoring the duty of an employer to act upon sexual harassment and assault in the workplace.

On the other hand, the Sixth Circuit has essentially stripped DNI of any management rights conferred by the CBA. Based upon the Sixth Circuit's Opinion, it appears that an arbitrator may interject any reason for determining that "just cause" does not exist, without even acknowledging or addressing an employers' express management rights. Surely, this contravene's the well-established doctrine that an arbitrator may not "dispense his own brand of industrial justice" or base an award on "general considerations of fairness and equity." If the decision of the Sixth Circuit is allowed to stand, the foregoing notions are essentially "dead."

Accordingly, DNI respectfully requests that its Petition for Writ of Certiorari be granted.

Respectfully submitted,

/s/_____

James M. Hill (0030633)
O'DIAM, McNAMEE & HILL CO., L.P.A.
2371 Lakeview Drive
Beavercreek, OH 45431-3696
Tele: (937) 427-1367
Attorney for Petitioner,
Dayton Newspapers, Inc.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Decided and Filed August 19, 1999]

No. 98-3530

General Truck Drivers, Chauffeurs, Warehousemen & Helpers, Local No. 957,
Plaintiff-Appellant,

v.

Dayton Newspapers, Inc.,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Ohio at Dayton.

Nos. 97-00172; 97-00194
Michael R. Merz, Magistrate Judge.
Argued: March 18, 1999

Before: KRUPANSKY, BOGGS, and CLAY, Circuit Judges.

BOGGS, J., delivered the opinion of the court, in which KRUPANSKY, J., joined. CLAY, J. (pp. 12-25), delivered a separate dissenting opinion.

OPINION

BOGGS, Circuit Judge. Plaintiff union appeals a judgment for defendant newspaper company vacating an arbitration award in favor of the union. Union employee Rick Elliott, a newspaper carrier dispatcher, was discharged by the company following an incident in which he grabbed a carrier by the neck. An arbitrator had ruled that Elliott was entitled to reinstatement because this incident did not constitute "just cause" for his termination as required under the parties' collective bargaining agreement. The court below set aside the arbitrator's decision, finding that Elliott had committed an "assault" and, thus, the newspaper was entitled to terminate him under the agreement. We reverse, on the ground that the court below did not have the authority to vacate the arbitration award simply because it disagreed with the arbitrator on the question of whether Elliott's behavior constituted "just cause" for his termination. The arbitrator arguably construed and interpreted the collective bargaining agreement which, under the standard outlined by the Supreme Court in *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987), is all that is needed to sustain the award.

I.

Rick Elliott was a supervisory employee at the Beavercreek, Ohio Distribution Branch of defendant-appellee Dayton Newspapers, Inc. ("DNI"). As Branch Captain, he was in charge of the morning distribution of newspapers to approximately 100 paper carriers. Elliott was a member of the General Truck Drivers, Chauffeurs, Warehousemen & Helpers Local Union No. 957 ("the Union"). The Union and

DNI had a collective bargaining agreement, which read, in pertinent part:

> *ARTICLE 5.* UNION-COMPANY RELATIONSHIP
>
> . . . .
>
> Section 3. The management of the plant and the direction of the working force including the right to hire, promote, suspend, discipline, discharge for proper cause, the right to transfer, the right to change working processes and equipment, and the right to publish and enforce reasonable plant rules for the performance of duties hereunder . . . are vested exclusively in the Company except as is set forth in writing in this Agreement. . . .
>
> *ARTICLE 11.* GRIEVANCE AND ARBITRATION PROCEDURE.
>
> . . . .
>
> Section 3. The Company agrees not to discharge or discipline any employee without just cause. The Company shall have the right at any time to promulgate rules and regulations and all employees shall be subject to such rules and regulations. The Company shall post such rules and regulations. . . .

> Section 4. The arbitrator shall have no power to change, modify, add to or detract from any terms of the contract. In discharge cases, the arbitrator shall have the power, but is not required, to order the discharged employee reinstated with back pay, less amounts received elsewhere, if he shall determine that the Company did not discharge such employee for proper cause.

DNI's workplace rules read, in pertinent part:

> The purpose of these rules and regulations is to provide you with examples of unacceptable conduct which may warrant discipline. Forms of discipline which the company may utilize include, but are not limited to, reprimand, suspension, or termination. The Company may impose any form of discipline, up to and including immediate discharge, that it deems appropriate.
>
> . . . .
>
> 7. Assault or the use of profane, abusive or threatening language toward fellow employees or supervisory personnel.

Elliott was terminated for an act he committed on February 24, 1996; an arbitrator later made specific findings of fact regarding Elliott's behavior on that date, which are summarized in this paragraph. These factual findings were later relied upon by the court below. The arbitrator found

that Elliott reported for work at approximately 2:30 a.m. Iris Thomas, one of DNI's paper c[illegible]ers, arrived at Beavercreek at around 3:30 a.m. to pick up the newspapers she was responsible for delivering that day. Elliott, a married man, was having a "personal relationship" with Thomas, who was not his wife. When Thomas arrived at the distribution facility, she was intoxicated, and started shouting at Elliott. The two got into an argument that lasted for several minutes. During this argument, Thomas told Elliott that he had been unfaithful to her, that she "knew how to make people disappear," and that "she would make [Thomas], his wife, and his kids disappear." Thomas then took several newspaper inserts and threw them on the floor in anger. Elliott came up behind Thomas, who "appeared out of control," and "grabbed her by the neck and started her towards the door." Steven Noffsinger, another carrier, told Elliott to let Thomas go; Elliott told Noffsinger to mind his own business. Elliott then "guided [] Thomas and her papers out the door," put Thomas's newspapers in her car, and went back inside.

Elliott was terminated on March 23, 1996 for his "physical abuse of a co-worker" on February 24, 1996. Elliott filed a grievance protesting his termination. A hearing on the grievance was held before an arbitrator on September 20, 1996. DNI contended that it discharged Elliott because it had "zero-tolerance" policy against violence in the workplace. The Union, however, argued that Elliott was dismissed without "just cause." The arbitrator sided with the Union, finding that Elliott's conduct did not provide DNI with "just cause" for termination because it did not constitute "workplace violence" as Elliott "was anxious to get Ms. Thomas out of the building as soon as possible." He granted

Elliott a back pay award and reinstatement on December 19, 1996.

DNI notified Elliott that it was reinstating him on January 27, 1997, and that Elliott should appear on that date for a meeting to discuss the terms and conditions of his employment. At the January 27, 1997 meeting, DNI told Elliott that he was reinstated, that the meeting was a pre-disciplinary hearing, and that he was being terminated for being an "unacceptable liability risk." The Union filed a grievance protesting this discharge, but DNI refused to arbitrate the dispute, contending that it did not have an obligation to do so.

On March 24, 1997, DNI filed a complaint against the Union, pursuant to Ohio Rev. Code § 2711.13, seeking to vacate the December 1996 arbitration award. The union removed the case to district court. It also filed a complaint of its own in district court, seeking to (1) enforce the award under the Labor Management Relations Act, 29 U.S.C. §§ 141-168 ("the Act"),[1] and (2) require DNI to arbitrate the

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[1] This court's jurisdiction to hear cases of this type arising under the Act is granted by 29 U.S.C. § 185 (1998), which states that

> [s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in

Union's grievance regarding Elliott's January 1997 termination. The two cases were consolidated.

A magistrate judge[2] granted summary judgment for DNI on its complaint and dismissed the Union's complaint. In vacating the arbitration award, the magistrate judge ruled that Elliott had committed an "assault" and, thus, the newspaper was entitled to terminate him under the collective bargaining agreement. The magistrate judge subsequently denied a motion by the Union to amend the judgment. The Union appeals.

II

The standard of review of an arbitrator's award is very narrow, and the courts must therefore accord the arbitrator's decision substantial deference. *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.* , 484 U.S. 29, 36-37 (1987). If an arbitrator's award "draws its essence" from the collective bargaining agreement and is not merely the arbitrator's "own brand of industrial justice," we must uphold the award. *See United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). An arbitrator's award fails to draw its essence from the agreement

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controversy or without regard to the citizenship of the parties.

[2] This case was referred to a magistrate judge by the district court with the consent of the parties. For this reason, the magistrate judge will simply be referred to as "the court below" in this opinion.

when it (1) conflicts with express terms of the agreement; (2) imposes additional requirements not expressly provided for in the agreement; (3) is not rationally supported by or derived from the agreement; or (4) is based on "general considerations of fairness and equity" instead of the exact terms of the agreement. *Cement Divs., National Gypsum Co. v. United Steelworkers of America* , 793 F.2d 759, 766 (6th Cir. 1986). If "the arbitrator is *even arguably* construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *Misco,* 484 U.S. at 38 (emphasis added). "It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *United Steelworkers v. Enterprise Wheel & Car. Corp.*, 363 U.S. 593, 599 (1960), *quoted in Lattimer-Stevens Co. v. United Steelworkers of America* , 913 F.2d 1166, 1169 (6th Cir. 1990).

In making his award, the arbitrator found that the collective bargaining agreement required DNI to have "just cause" for terminating an employee, and that the company did not have "just cause" for Elliott's termination. The court below evidently thought that the arbitrator's award somehow conflicted with express terms of the collective bargaining agreement, because DNI's workplace rules, according to the court, "provide that DNI may discipline for. . . assault in the workplace [and] may impose any form of discipline including. . . termination." The court below believed that since DNI was permitted to enforce reasonable disciplinary rules, its termination of an employee under those rules for assault automatically constituted "just cause."

Under the law of this circuit, this is simply wrong. In *Bruce Hardwood Floors v. Southern Council of Indus. Workers*, 8 F.3d 1104 (6th Cir. 1993), the plaintiff company and defendant union had entered into a collective bargaining agreement that expressly listed sleeping on duty as conduct for which employees "may" be discharged immediately. *Id.* at 1105. An employee was fired by the company for breaking this rule, but an arbitrator ordered the reinstatement of that employee on the ground that the employee was not terminated for "just cause," even though the arbitrator had found that employee had fallen asleep on job. *See id.* at 1105-06. The district court vacated the award on the ground that it did not "draw its essence" from the agreement between the Union and the Company, because once the Company determined that an employee had committed the offense of sleeping on the job, it necessarily established just cause for the employee's dismissal. *See id.* at 1106-07. This court reversed, noting:

> [One clause of the collective bargaining agreement at issue] states only that an employee "may" be discharged for committing the enumerated offenses. Moreover, section 1 [of the collective bargaining agreement] vests the Company with the right "to discipline and discharge employees for just cause." We find that these clauses. . . created sufficient basis for the arbitrator to conclude that he had the authority to review the penalty imposed. The arbitrator's award thus was rationally derived from the terms of the agreement and not simply based on general considerations of fairness and equity. The award, moreover, did not conflict with the express terms of the

> agreement, and did not impose additional requirements not expressly provided in the agreement. *Whether the arbitrator's reading of the agreement was strained or even seriously flawed, and whether the district court's per se just cause analysis is more plausible, is irrelevant.* The arbitrator *arguably construed and applied the agreement*, and this is precisely what the parties bargained for him to do.

Id. at 1108 (citations omitted) (emphasis added).

Bruce Hardwood Floors compels a finding that the arbitrator in this case had a "sufficient basis. . . to conclude that he had the authority to review the penalty imposed." In fact, unlike the collective bargaining agreement at issue in *Bruce Hardwood Floors* , the collective bargaining agreement in this case does not even explicitly permit the employer to discharge an employee for committing certain specified workplace offenses; it only states that "[t]he Company shall have the right at any time to promulgate rules and regulations and all employees shall be subject to such rules and regulations."

Under the holding of the court below, DNI would seem to have *carte blanche* to terminate an employee for violating *any* workplace rule. However, the arbitrator, in construing and applying the collective bargaining agreement, felt that the agreement did not give DNI this power. The plain language of the collective bargaining agreement states only that DNI "agrees not to discharge or discipline any employee without just cause," and that the arbitrator is to

determine whether "the Company did [or did] not discharge such employee for proper cause." The arbitrator's weighing of whether Elliott's behavior constituted "just cause" not only does not conflict with express terms of the agreement, but in fact seems to be the type of review *compelled* by the agreement. At a bare minimum, the arbitrator's analysis is clearly "rationally supported by or derived from the agreement" and based on "the exact terms of the agreement," as required under *National Gypsum.*

The court below mistakenly believed that the arbitrator imposed additional requirements not expressly provided for in the agreement. The court stated, "The collective bargaining agreement nowhere provides that before DNI may discipline an employee for engaging in assault in the workplace, it must last for a particular period of time, that abuse and/or physical harm must have resulted, or that the assault requires that one person 'hit' another." This holding by the court is completely backwards, since it is based on the assumption that DNI had some sort of right to terminate employees for breaking the company rule on assault independent of "just cause." This is incorrect, for the collective bargaining agreement does not explicitly give the company such a right. The arbitrator was not creating "additional requirements" under the collective bargaining agreement; he was simply evaluating whether DNI had "just cause" to terminate Elliott for his behavior. In so doing, the arbitrator had the power to determine whether Elliott was fired for "just cause," even if the company was correct in its contention that the termination was simply the result of DNI's literal application of its workplace rules to Elliott's behavior. In fact, a rather strong argument can be made that the court below (and not the arbitrator) rendered a decision that was not rationally supported by or derived from

the collective bargaining agreement, since it seems to have believed that the agreement gave DNI a right to terminate employees for engaging in any conduct that would be a technical assault in the workplace that was somehow independent of the company's right to terminate employees only for "just cause."

The court below failed to rule on two issues on the ground that its vacation of the arbitration award rendered the issues moot. DNI stated in its complaint that the arbitrator's award was not properly reduced by "amounts received elsewhere," as required by the CBA. The Union contended in its complaint that DNI's refusal to arbitrate its dispute with the Union regarding Elliott's second termination for being an "unacceptable liability risk" was a breach of DNI's obligations under the DNI. Since we hold that the vacation of the arbitration award was improper, this consolidated matter is remanded so that the court below can determine whether (1) the arbitrator's award was properly not reduced by "amounts received elsewhere," and (2) DNI's refusal to arbitrate its dispute with the Union regarding Elliott's second termination for being an "unacceptable liability risk" was a breach of DNI's obligations under the collective bargaining agreement.

III

This case is REVERSED and REMANDED for further proceedings consistent with this opinion.

DISSENT

CLAY, Circuit Judge, dissenting. Because I believe that this case presents an instance where the arbitrator's award

did not "draw its essence" from the collective bargaining agreement ("CBA") at issue, I respectfully dissent from the majority's decision to reverse the district court's order granting summary judgment to Defendant, Dayton Newspapers, Inc. Although the scope of review regarding an arbitrator's award is very limited, the deference afforded to the award is not so great that the award may never be reversed. Rather, the arbitrator's award may be reversed when it fails to "draw its essence" from the CBA, and I believe that the district court was correct in concluding that the award in this case failed to do just that, inasmuch as the award conflicted with the express terms of the CBA and imposed additional requirements not expressly provided in the agreement.

I. The District Court's Order Granting Summary Judgment on Defendant's Motion to Vacate the Arbitrator's Award

This Court reviews a district court's decision *de novo* on a motion for summary judgment, including instances where summary judgment was granted in a labor arbitration case. *See Dallas v. Mavis Forwarding Co., General Drivers, Warehousemen & Helpers, Local Union No. 89,* 972 F.2d 129, 133 (6th Cir. 1992). Although we review the district court's decision in such a case *de novo,* the scope of review is extremely limited. *See Monroe Auto Equip. Co. v. International Union, United Automotive, Aerospace and Agric. Implement Workers of Am. (UAW),* 981 F.2d 261,265 (6th Cir. 1992). That is to say, because the parties have "authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract." *United*

Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 37-38, 108 S. Ct. 364, 370-71 (1987). However, "[t]he arbitrator may not ignore the plain language of the contract," such that "the arbitrator's award settling a dispute with respect to the interpretation or application of a labor agreement must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice." *Id.*

In *Cement Divisions National Gypsum Co. v. United Steel Workers of America,* this Court found that an arbitration award fails to derive its essence from the CBA under one of the following four conditions:

> [W]hen (1) an award conflicts with express terms of the collective bargaining agreement; (2) an award imposes additional requirements that are not expressly provided in the agreement; (3) an award is without rational support or cannot be rationally derived from the terms of the agreement; and (4) an award is based on general considerations of fairness and equity instead of the precise terms of the agreement.

793 F.2d 759, 766 (6th Cir. 1986) (citations omitted). Although the majority accurately states the standard under which we are to review the arbitrator's award, I believe that it misapplies this standard in analyzing the facts of this case.

The district court found that Arbitrator Goggin's award did not derive its essence from the CBA because the award conflicted with the express terms of the CBA and imposed additional requirements that were not expressly

provided therein. Specifically, the district court found that as a matter of law, the award did not derive its essence from the CBA with respect to the award's finding that Defendant did not have "just cause" to discharge Elliott -- i.e., the award's finding that Elliott's actions were not in violation of Defendant's promulgated rules. The district court also found that the award did not draw its essence from the CBA as a matter of law with respect to the award's finding the Elliott's procedural due process rights were violated here. I agree with the district court on both counts; however, my reasoning differs from the district court's reasoning on the procedural due process issue.

A. Whether the Award Drew its Essence from the CBA as a Matter of Law on the Issue of Whether Defendant had "Just Cause" to Discharge Elliott?

The district court found that the award did not derive its essence from the CBA as a matter of law with respect to the issue of whether Defendant had just cause to terminate Elliott, inasmuch as Arbitrator Goggin found that Elliott "grabbed" Thomas, and yet concluded that Elliott had not engaged in "workplace violence" as to constitute grounds for discharge. The district court noted that the flaw in the award was that the standard for discipline/termination, as promulgated by Defendant's workplace rules as incorporated into the CBA, is not "workplace violence" but rather, "assault." Specifically, the district found as follows:

> [I]n his recitation of his finding of fact, the arbitrator noted, "[a]t that point in time, the grievant came up behind Ms. Thomas, who

> was weaving back and forth and appeared out of control, and *grabbed her by the back of the neck* and started her toward the door." In spite of his factual finding that Mr. Elliott had grabbed Ms. Thomas by the back of the neck, the arbitrator concluded that Mr. Elliott had not engaged in "workplace violence." Therein lies the flaw in the arbitrator's award.
>
> There is absolutely no reference in the CBA or in [Defendant's] workplace rules to "workplace violence." Rather, the workplace rules adopted by [Defendant] clearly provide that "assault" may be grounds for discipline, up to and including discharge. The term "assault" is clear and unambiguous when given its plain and ordinary meaning and it needs no interpretation. Assault is a 'violent physical or verbal attack'. *Websters New Collegiate Dictionary* (1992 ed.)

(J.A. at 35 (emphasis is original).) I agree with the district court's reasoning and conclusion, and believe that the majority inaccurately applies our standard of review in reaching a contrary result.

The relevant portions of the CBA are as follows:

> *ARTICLE 5.* UNION-COMPANY RELATIONSHIP
>
> * * *

Section 3. The management of the plant and the direction of the working force including the right to hire, promote, suspend, discipline, discharge for proper cause, the right to transfer, the right to change working processes and equipment, and the right to publish and enforce reasonable plant rules for the performance of duties hereunder, the selection and retention of employees and the working days to which they are assigned are vested exclusively in the Company except as is set forth in writing in the Agreement. The Company reserves exclusively all of its normal and inherent rights to manage the business, whether exercised or not, excluding only such rights as are specifically relinquished or modified by a specific provision of this Agreement.

* * *

ARTICLE 11. GRIEVANCE AND ARBITRATION PROCEDURE

* * *

Section 3. The Company agrees not to discharge or discipline any employee without just cause. The Company shall have the right any time to promulgate and enforce rules and regulations and all employees shall be subject to such rules and regulations. The Company shall post such rules and regulations. No

> member of the bargaining unit shall be discharged or disciplined with loss of pay without first being given a hearing. At such a hearing, an officer or Business Agent of the Union shall be present. The hearing shall take place within 24 hours after being brought to the attention of the employee. If an agreement is reached at such hearing, it shall be final and binding on all the parties.
>
> Section 4. The arbitrator shall have no power to change, modify, add to or detract from any terms of the contract. In discharge cases the arbitrator shall have the power, but is not required, to order the discharged employee reinstated with back pay, less amounts received elsewhere, if he shall determine that the Company did not discharge such employee for proper cause.

(J.A. at 61-62, 67-68.) Furthermore, the relevant rules promulgated by Defendant state in pertinent part as follows:

> The purpose of these rules and regulations is to provide you with examples of unacceptable conduct which may warrant discipline. Forms of discipline which the company may utilize include, but are not limited to, reprimand, suspension and termination. The Company may impose any form of discipline up to and including immediate discharge, that it deems to be appropriate. [An employee violates these

> rules when he engages in the following conduct.]
>
> * * *
>
> 6. By word or action discredit or bring reproach upon co-workers or others on the basis of their race, religion, national origin, disability or sex.
>
> *7. Assault* or the use of profane, abusive or threatening language toward fellow employees or supervisory personnel.

(J.A. at 82 (emphasis added).)

Accordingly, based upon the express terms of the CBA and the rules incorporated therein, Arbitrator Goggin's finding that Elliott had "grabbed [Thomas] by the back of the neck" did not support his conclusion that Defendant did not have "just cause" to discipline Elliott, and the award therefore did not draw its essence from the CBA. *See Cement Divs. Nat'l Gypsum Co.*, 793 F.2d at 766. Clearly, pursuant to Article 5, Section 3, and Article 11, Section 3 of the CBA, Defendant has the right to terminate an employee for "just cause;" pursuant to Article 11, Section 3, Defendant has the right to promulgate and enforce rules and all employees shall be subject to those rules; under the rules, Defendant may impose any form of discipline up to and including immediate discharge for a violation thereof; and pursuant to Rules 6 and 7, an employee may not discredit or bring reproach upon a co-worker on the basis of, among other things, sex, nor may an employee assault or use profanity toward fellow

employees. Furthermore, to bring "reproach" is commonly understood to mean to bring shame, disgrace, or blame; and to "assault" someone is commonly understood to mean "a violent attack with physical means." Webster's Third International Dictionary 130, 1927 (1993); *see Dobbs, Inc. v. Local No. 614, Int'l Bhd. of Teamsters,* 813 F.2d 85, 86 (6th Cir. 1987) (citing *Detroit Coil v. International Assoc. of Machinists & Aerospace Workers,* 594 F.2d 575,579 (6th Cir. 1979) (finding that terms in a collective bargaining agreement are to be given their ordinary meaning in the absence of evidence indicating that the parties intended to deviate from that meaning).

Thus, for Arbitrator Goggin to have found that Elliott's act of "[coming] up behind Ms. Thomas. . . and grabb[ing] her by the back of the neck and start[ing] her toward the door, particularly while acknowledging that the two were arguing at the time, did not amount to a violation of the rules as incorporated into the CBA -- i.e., Elliott's actions did not serve as "just cause" for his discharge -- conflicts with the express terms of the CBA where these actions clearly amount to an assault. Therefore, the award did not derive its essence from the CBA on this point as a matter of law. *See Cement Divs. Nat'l Gypsum Co.,* 793 F.2d at 766.

I am not persuaded otherwise by the Union's argument that Defendant consistently characterized Elliott's actions as "workplace violence," thereby somehow rendering this term the standard by which the CBA is to be interpreted. I find the Union's argument to be nothing more than a red herring and a vain attempt to argue semantics where the issue is not the terminology used by Defendant in matters associated with this incident; but, rather, the express, unambiguous language of

the rules as incorporated into the CBA and whether Elliott's actions rose to the level of a violation thereof.[3]

Furthermore, Arbitrator Goggin's findings that "the incident did not last more than about a minute;" that "[n]o witness testified that he or she saw the grievant hit Ms. Thomas;" that "it would appear that [Elliott] was not trying to abuse Ms. Thomas;" and that "[t]here was no evidence in the record which indicated that [Elliott] had hurt Ms. Thomas," imposed additional requirements upon Defendant for disciplining an employee that are not in the CBA, and serves as another basis for finding that the award did not draw its essence from the CBA on this issue. *See Cement Divs. Nat'l Gypsum Co.*, 793 F.2d at 766. In other words, the rules do not provide that it must be found that an employee "hit," "abused," or "hurt" another employee before Defendant can impose discipline, nor do the rules impose a time limit as to how long the assault must last before discipline may be imposed. Rather, the rules state that Defendant may impose discipline -- up to and including discharge -- when an

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[3] Notably, the record indicates that Elliott called Thomas a "bitch" as he escorted her from the building; that he told inquiring co-workers to "stay the hell out of it;" and that this evidence was presented to Arbitrator Goggin, yet Defendant failed to come forward with evidence to refute these verbal profanities. Therefore, pursuant to Defendant's roles, Elliott's use of profanity in this regard would also have served as "just cause" for his discharge. However, Arbitrator Goggin's award did not make mention of Elliott's use of these profanities, although the record indicates that the arbitrator had this evidence before him. Furthermore, the record indicates that Thomas was discharged for her actions in relation to this incident as well.

employee brings reproach upon a co-worker based upon the co-worker's sex, or assaults another employee. Accordingly, because Arbitrator Goggin imposed these additional criteria upon Defendant in determining whether Elliott's actions violated the CBA, the award did not derive its essence from the CBA as a matter of law.[4] *See id.*

B. Whether the Award Drew its Essence from the CBA as a Matter of Law on the Issue of Whether Elliott's Procedural Due Process Rights were Violated?

The district court also found that the award did not derive its essence from the CBA as a matter of law with respect to the denial of Elliott's predisciplinary hearing inasmuch as Arbitrator Goggin imposed an additional obligation upon Defendant regarding this hearing that is not required by the CBA. Specifically, the district court found as follows:

> The Court reaches a similar conclusion with respect to the arbitrator's award as it relates to the Pre Discipline Hearing issue. In addressing that issue, the arbitrator determined that, "It is clear from the record in this case that the Company never "officially" contacted

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[4] Because the award did not derive its essence from the CBA, the issues of whether the award violated public policy; whether the award of full back pay to Elliott was in violation of the express language of the CBA; and whether the award should be vacated because Arbitrator Goggin destroyed the tapes from the arbitration hearing are moot.

> an officer or Business Agent of the Union". Nevertheless, the arbitrator acknowledged "[t]he only evidence on the record with regard to this obligation was an "informal" exchange in the Company lunchroom at some unspecified time". In addition, the arbitrator found that there was a discussion between [Defendant] personnel and the Union Recording Secretary that a bargaining unit employee was being disciplined. There is nothing in the CBA which references either "formal" or "informal" notice to the Union that [Defendant] intends to discipline a bargaining unit employee. Yet, the arbitrator created an obligation which did not exist in the CBA that any notice [Defendant] gave to the Union be some nondescriptive "formal" notice. The arbitrator's imposition of a "formal" notice requirement is without warrant in the CBA.

(J.A. at 37.) I agree with the district court that the award did not derive its essence from the CBA as a matter of law on this issue, but for different reasons. *See City Management Corp. v. United States Chem. Corp., Inc.*, 43 F.3d 244, 251 (6th Cir. 1994) (finding that this Court may affirm on any grounds supported by the record, even though they may be different grounds than those relied upon by the district court).

Contrary to the district court's distinction, the issue here is not whether a "formal" or "informal" hearing is required under the CBA, particularly because Defendant does not contest that a predisciplinary hearing was not held.

Rather, Defendant claims, as it did before Arbitrator Goggin, that the Union *waived* the hearing. Defendant supports its claim on appeal with the affidavit of Brett Thurman, Defendant's General Counsel and Human Resources Manager, inasmuch as Arbitrator Goggin could not comply with Defendant's subpoena duces tecum for the tape recordings from the arbitration hearing in this case. Thurman's affidavit states in relevant part as follows:

> 13. The issue of whether there was a predisciplinary hearing was not presented to the Arbitrator in that all of the parties conceded at the hearing that a predisciplinary hearing was *not* held.
>
> 14. At the hearing in this case, Chuck Friend (then a division manager with [Defendant]) and I, testified that we discussed predisplinary [sic] procedure regarding Elliott with John Burns ("Burns"), a Union representative.
>
> 15. Both Thurman and Friend testified that during these discussions, Burns expressly agreed to waive the predisciplinary hearing set forth in the CBA. There was no evidence that refuted or attempted to refute this testimony at the hearing.
>
> 16. In fact, the Union not only waived the hearing requirement, it also initially indicated it would not grieve Elliott's discharge, and admitted this to the Arbitrator.

> However, after Elliott filed a claim against the Union for failure to represent him with the National Labor Relations Board, the Union settled that claim by agreeing to grieve and arbitrate Elliott's termination.

(J.A. at 78-79.) The Union did not respond to Thurman's affidavit with any evidence to the contrary. Although the Union did submit an affidavit from John Burns, its Recording Secretary and Business Representative, as an exhibit attached to its motion for summary judgment, a review of the affidavit does not refute the contentions made by Thurman in his affidavit regarding waiver of the predisciplinary hearing. Furthermore, although the Union submitted a second affidavit from Burns which attempted to refute Thurman's affidavit on the issue of waiver, Burns' second affidavit was not submitted until *after* the district court issued its decision and order in this case when the Union submitted its motion to amend the judgment. Because it is well-settled that when reviewing a grant of summary judgment, this Court must confine its review to the evidence as submitted to the district court at the time, the Court may not consider Burns' March 9, 1998 affidavit -- the affidavit submitted after the district court had ruled on the motions for summary judgment -- when considering the district court's decision here. *See* Fed. R. App. P. 10(a); *Landefeld v. Marion Gen. Hosp.*, 994 F.2d 1178, 1181 (6th Cir. 1993).

The Union makes an unsupported assertion that "Arbitrator Goggin found the alleged notice to the Union was insufficient to support a knowing waiver of the contractual obligation." However, the award does not expressly or implicitly make such a finding. The award simply found that

a conversation which took place between Defendant and the Union Recording Secretary in Defendant's lunch room did not rise to the level of a "formal" hearing as required by the CBA. The award makes no mention that this exchange in the lunch room was insufficient to constitute a knowing *waiver* of the hearing.

Accordingly, because the Union failed to come forward with any evidence to create a genuine issue of fact that it did not agree to waive the hearing, as attested to by Thurman's affidavit, the district court properly granted Defendant's motion for summary judgment because the award is without rational support and cannot be rationally derived from the terms of the CBA, where the express requirement the award found lacking -- the predisciplinary hearing -- was *waived* by the Union as a matter of law. *See Cement Divs. Nat'l Gypsum Co.*, 793 F.2d at 766.

In summary, because I believe that the arbitration award did not draw its essence from the CBA on the issues of whether Defendant had just cause to terminate Elliott as well as whether Defendant violated Elliott's due process rights, I disagree with the majority's holding and would affirm the district court's order granting Defendant's summary judgment motion to vacate the arbitrator's award.

II. The District Court's Order Denying The Union's Motion to Alter or Amend the Judgment Pursuant to Rule 59(e)

Apparently because the majority disagreed with the district court's decision to vacate the arbitrator's award, it did not reach the Union's claim that the district court abused its

discretion in denying its motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e). However, because I believe that the district court reached the right result in vacating the award, I will briefly address the Union's Rule 59(e) motion as follows.

It is well settled that this Court reviews a denial of a motion to alter or amend the judgment under Rule 59(e) for an abuse of discretion. *Huff v. Metropolitan Life Ins. Co.*, 675 F.2d 119, 122 (6th Cir. 1982). In its motion to amend the judgment, the Union argued that the district court made an erroneous factual finding when it found that the award did not draw its essence from the contract, because the term "workplace violence," as used by Arbitrator Goggin, was simply in line with Defendant's use of the phrase. The Union also argued that the district court made a legal error in concluding that Elliott committed an "assault" upon Thomas because the court impermissibly substituted its judgment of the facts for Arbitrator Goggin's judgment. In support of its motion, the Union submitted the affidavit of John Burns which basically provided his rendition of the events that occurred at the arbitration hearing.

In denying the Union's motion, the district court refused to consider Burns' affidavit because Burns had been available since the time that the incident occurred, he had provided a previous affidavit, and had participated in the arbitration hearing. As such, Burns' affidavit submitted with the Union's motion did not constitute "newly" discovered evidence of the type to be considered in a Rule 59(e) motion. In addition, the district court denied the motion on the basis that the Union essentially raised the same arguments as it raised in its motion for summary judgment.

Rule 59(e) motions serve a limited purpose and should be granted for one of three reasons: (1) because of an intervening change in controlling law; (2) because evidence not previously available has become available; or (3) because it is necessary to correct a clear error of law or prevent manifest injustice. *See Javetz v. Board of Control, Grand Valley Univ.*, 903 F. Supp. 1181, 1190 (W.D. Mich. 1995); *Keweenaw Bay Indian Community v. State of Michigan*, 152 F.R.D. 562, 563 (W.D. Mich. 1992), *affirmed*, 11 F.3d 1341 (6th Cir. 1993). In addition, "[i]t is well-established. . . that a district court does not abuse its discretion in denying a Rule 59 motion when it is premised on evidence that the party had in his control prior to the original entry of judgment." *Emmons v. McLaughlin*, 874 F.2d 351,358 (6th Cir. 1989) (rejecting affidavits submitted with the movant's Rule 59 motion which could have been submitted prior to the court's ruling on the motion for summary judgment).

Here, I agree with the district court that the Union is simply seeking a second bite of the apple in bringing its motion to amend, where the Union makes the same argument as it did at the summary judgment stage and fails to set forth any meritorious errors of law. The Union's claim that the district court erroneously substituted its judgment for that of the district court is simply an argument based upon semantics, and begs the question when considering that Arbitrator Goggin found that Elliott grabbed Thomas by the back of her neck, and yet failed to conclude that Elliott violated the CBA – i.e., his actions did not constitute just cause for discharge. Again, the award is to draw its essence from the plain language of the CBA, and that language clearly makes an "assault" just cause for discharge.

In addition, the district court properly exercised its discretion in refusing to consider Burns' affidavit submitted with the Union's motion, where Burns had consistently been involved with these proceedings and had submitted a previous affidavit, and yet Burns failed to come forward with statements made in the affidavit at hand until the Union filed its motion to amend. *See Emmons* , 874 F.2d at 358; *Javetz,* 903 F. Supp at 1191-92 (finding that additional evidence should only be considered under a Rule 59(e) motion if, in the exercise of all diligence, it could not have been submitted before its current submission).

Based upon the foregoing, I dissent from the majority's decision to reverse the district court's order to vacate the arbitrator's award. Although it is tree that the scope of our review of an arbitrator's award is limited, the award must nonetheless derive its essence from the CBA and I agree with the district court that the award failed to do so here.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

[Filed February 23, 1998]

No. C-3-97-194 Consolidated
with No. 97-194

TEAMSTERS LOCAL UNION NO. 957, *Plaintiff(s),*	)
v.	)
DAYTON NEWSPAPERS, INC., *Defendant(s).*	)

JUDGMENT IN A CIVIL CASE

[] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the Jury has rendered its verdict.

X **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Motion for Summary Judgment (Doc. #4), of the Plaintiff Teamsters Local Union No. 957, is DENIED;

that the Cross Motion for Summary Judgment (Doc. #17), of the Defendant Dayton Newspapers, Inc., is GRANTED;

that Judgment is entered in favor of the Defendant Dayton Newspapers, Inc. and against the Plaintiff Teamsters Local Union No. 957;

that the arbitrator's award of December 19, 1996 is VACATED;

and that the Plaintiff's Complaint is DISMISSED WITH PREJUDICE.

February 23, 1998

Kenneth J. Murphy
Clerk

/s/_____
(By) Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION AT DAYTON

[Filed February 23, 1998]

No. C-3-97-172 Consolidated with No. 97-194

TEAMSTERS LOCAL UNION NO. 957,
Plaintiff(s),

v.

DAYTON NEWSPAPERS, INC.,
Defendant(s).

DECISION AND ORDER
[Entered: February 21, 1998]

This case is before the Court on Plaintiff's Motion for Summary Judgment, (Doc. 4), and Defendant's Cross Motion for Summary Judgment. (Doc. 17). The parties have fully briefed the issues, (Doc. 4, 17, 18, 20, 26), and the matter is ripe for decision on the merits. The parties have consented to plenary magistrate Judge jurisdiction pursuant to 28 U.S.C. 636(c) and the matter has been referred on that basis. (Doc. 6).

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56. On a motion for summary judgment, the movant has the burden of showing that there exists no genuine issue of material fact, and the evidence, together with all inferences that can reasonably be drawn therefrom, must be read in the light most favorable to the party opposing the motion. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-59 (1970). Nevertheless, the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to "secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

Read together, *Liberty Lobby* and *Celotex* stand for the proposition that a party may move for summary judgment asserting that the opposing party will not be able to produce sufficient evidence at trial to withstand a Rule 50 motion for judgment as a matter of law. *See, Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1989). If, after sufficient time for discovery, the opposing party is unable to demonstrate that he or she can do so under the *Liberty Lobby* criteria, summary judgment is appropriate. *Id.* The opposing party must "do more than simply show that there is some

metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

The moving party

> [A]lways bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex, 477 U.S. at 323; *see also, Boretti v. Wiscomb*, 930 F.2d 1150, 1156 (6th Cir. 1991) (citation omitted). In ruling on a motion for summary judgment (in other words, determining whether there is a genuine issue of material fact), "[a] district court is not . . . obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim." *Interroyal Corp. v. Sponseller*, 889 F.2d 108, 111 (6th Cir. 1989), *cert. denied*, 494 U.S. 1091 (1990). Thus, in determining whether a genuine issue of material fact exists on a particular issue, a court is entitled to rely only upon those portions of the verified pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits submitted, specifically called to its attention by the parties.

With these principles in mind, the facts of this case, which are generally not in dispute, are as follows.

Plaintiff Teamsters Local Union No. 957 ("Union") and Defendant Dayton Newspapers, Inc. ("DNI") were parties to a collective bargaining agreement ("CBA") which was effective December 27, 1992, through December 29, 1996. The CBA had provisions governing the resolution of any controversies or disputes between a bargaining unit employee or the Union and DNI. Included was a provision for binding arbitration. In addition, the CBA provided in part:

> Article 5. UNION-COMPANY RELATIONSHIP
>
> . . .
>
> Section 3. The management of the plant and the direction of the working force including the right to hire, promote, suspend, discipline, discharge for proper cause, the right to transfer, the right to change working processes and equipment, and the right to publish and enforce reasonable plant rules for the performance of duties hereunder, the selection and retention of employees and the working days to which they are assigned are vested exclusively in the Company except as is set forth in writing in this Agreement. The Company reserves exclusively all of its normal and inherent fights to manage the business, whether exercised or not, excluding only such fights as are specifically relinquished or modified by a specific provision of this Agreement.

. . .

Article 11 GRIEVANCE AND ARBITRATION PROCEDURE

. . .

Section 3. The Company agrees not to discharge or discipline any employee without just cause. The Company shall have the right at any time to promulgate and enforce rules and regulations and all employees shall be subject to such rules and regulations. The Company shall post such rules and regulations. No member of the bargaining unit shall be discharged or disciplined with loss of pay without first being given a hearing. At such a hearing, an officer or Business Agent of the Union shall be present. The hearing shall take place within 24 hours after being brought to the attention of the employee. If an agreement is reached at such hearing, it shall be final and binding on all parties.

Section 4. The arbitrator shall have no power to change, modify, add to or detract from any terms of the contract. In discharge cases the arbitrator shall have the power, but is not required, to order the discharged employee reinstated with back pay, less amounts received elsewhere, if he shall determine that the Company did not discharge such employee for proper cause.

DNI's posted workplace rules read in part:

> The purpose of these rules and regulations is to provide you with examples of unacceptable conduct which may warrant discipline. Forms of discipline which the company may utilize include, but are not limited to, reprimand, suspension and termination. The Company may impose any form of discipline up to and including immediate discharge, that it deems to be appropriate.
>
> 7. Assault or the use of profane, abusive or threatening language toward fellow employees or supervisory personnel.
>
> . . .

On March 13, 1996, DNI terminated the employment of Rick Elliott. Mr. Elliott filed a grievance and eventually the dispute went to arbitration. An arbitration hearing was held on September 20, 1996, and was declared closed upon the arbitrator's receipt of the Union's brief of October 17, 1996. By decision dated December 19, 1996, the arbitrator sustained Mr. Elliott's grievance. Essentially, the arbitrator determined that DNI has violated the CBA by failing to give Mr. Elliott a pre-termination hearing and by terminating him without just cause. The arbitrator directed DNI to immediately reinstate Mr. Elliott to his prior position with full seniority, full back pay, health benefits, and all other benefits he should have received but for his unjustified discharge.

During this period of time, specifically on March 22, 1996, Elliott filed for unemployment benefits. On April 10,

1996, the Administrator issued an initial determination holding that Elliott was discharged without just cause. DNI filed a request for reconsideration and on June 3, 1996, a decision was issued affirming the initial determination. DNI filed an appeal to the Board of Review and a hearing was held on June 27, 1996. On July 3, 1996, the hearing officer determined that Mr. Elliott had physically assaulted a co-worker and that DNI had terminated him for just cause. Mr. Elliott apparently appealed that decision and a hearing was scheduled. However, it appears that Mr. Elliott did not appear for the hearing and on March 7, 1997, the appeal was dismissed.

Subsequent to receiving the arbitrator's December 19, 1996, award sustaining Mr. Elliott's grievance, and after receiving correspondence from the Union with respect to reinstating Mr. Elliott, DNI notified Mr. Elliott by letter dated January 23, 1997, that, reserving all of its rights, it was reinstating him effective January 27, 1997. DNI requested that Mr. Elliott appear on that, date at a meeting to discuss the terms and conditions of his reinstatement. DNI also advised Mr. Elliott in that letter that pursuant to the expired CBA it had set up a meeting immediately following the reinstatement meeting to discuss liability issues and his continued employment with DNI.

At the January 27, 1997, meeting, DNI told Mr. Elliott that he was reinstated, that the meeting was a pre-disciplinary hearing, and that DNI was terminating Mr. Elliott's employment because it had determined that he was an "unacceptable liability risk". The Union filed a grievance protesting his discharge and on February 13, 1997, Mr. Elliott was notified that DNI had denied the grievance. By

letter dated February 13, 1997, the Union advised DNI that it wanted to proceed to arbitration and DNI refused to do so alleging that there was no legal or contractual obligation to do so.

On March 24, 1997, DNI filed a Complaint against the Union pursuant to Ohio Revised Code §2711.13 in the Common Pleas Court of Montgomery County, Ohio. In that action, DNI sought to vacate the December, 1996, arbitration award. The Union removed that case to this Court on April 23, 1997, and it is Case No. C-3-97-194, the action that is consolidated with the present case.

Subsequent to the state action being filed by DNI and prior to removing that action to this Court, specifically on April 10, 1997, the Union filed the present action pursuant to the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §141, *et seq.*, ("the Act"), essentially seeking to enforce the December, 1996, arbitration award. The Union also seeks to enforce the terms of the CBA requiring DNI to arbitrate Mr. Elliott's January, 1997, termination.

The arbitrator's award sustaining Mr. Elliott's grievance reads in part:

BACKGROUND

> At the time of his discharge, the grievant was the Branch Captain at the Company's Beavercreek Distribution Branch. . . .
>
> As Branch Captain at the Beavercreek facility, the grievant was responsible for getting the

papers ready for pickup by the carriers (who are independent contractors) so that the papers could be delivered in a timely manner. . . .

On February 24, 1996, the grievant reported for work at approximately 2:30 a.m. He and his family had worked at the facility the previous evening and he knew that there were still some inserts which had to be ready for the carriers when they arrived later that morning. The grievant also had to place inserts in some of the papers since he was aware that one of the carriers would not be available and that he (the grievant) would have to deliver the papers on that route.

While the grievant was performing his work on February 24, he was approached by Ms. Thomas. According to the evidence, Ms. Thomas, one of the carriers with whom the grievant had had a personal relationship, arrived at the facility sometime around 3:30 a.m. Since Ms. Thomas had called the grievant earlier that night claiming that he was not being faithful to her, he started to bag her papers to have them ready for her when she arrived. Not long after she arrived, Ms. Thomas came and leaned over the Branch Captain's bench where the grievant was sitting and bagging papers. However, when Ms. Thomas leaned over the Branch Captain's bench that morning, it was clear to the grievant that she had been drinking.

When Ms. Thomas came to the Branch Captain's bench, the grievant was talking to Mr. Hamilton, one of the Carriers. Ms. Thomas told Mr. Hamilton, who was talking to the grievant, to "Shut the fuck up." She then started arguing with the grievant. . . .

Because of her intoxicated condition, the grievant told Ms. Thomas that she should call her mother and have her come and help her deliver the papers. Ms. Thomas did not follow the grievant's suggestion.

During the argument, the grievant told Ms. Thomas to take her papers and leave. Ms. Thomas said that he had been unfaithful to her and that she knew how to make people disappear. She indicated that she would make the grievant, his wife, and his kids disappear.

Ms. Thomas then picked up some of the inserts, which were on the bench waiting to be stuffed into the papers, and threw them on the floor. The grievant then took the papers, which he had prepared for Ms. Thomas, around the bench to give them to her. She yelled something to him and Mr. Hamilton. Ms. Thomas then went toward the first bench but continued to yell at the grievant and Mr. Hamilton.

At that point in time, the grievant came up behind Ms. Thomas, who was weaving back

and forth and appeared out of control, and grabbed her by the back of the neck and started her toward the door. When the grievant grabbed Ms. Thomas, he had most of her papers in a shopping cart and was trying to get Ms. Thomas and the papers out into her car in the parking lot. . . .

After this brief exchange [between grievant and another carrier] . . . the grievant guided Ms. Thomas and her papers out the door. The grievant put the papers in her car and went back into the building to continue his work. . . .

. . .

About 5:45 a.m. the grievant picked up his wife and kids. His wife had a route to deliver. When the grievant arrived back at the Branch, he tried to talk to one of the supervisors about what happened. The supervisor came out and told the grievant that Ms. Thomas had called and asked that her route be put on alert. He indicated that Ms. Thomas was crying. The supervisor wanted to know what was wrong with her. The grievant said that he did not know. The supervisor suggested that he check on her. After his brief discussion with the supervisor, the grievant did not have any other discussion with him or Ms. Thomas that day.

Although the grievant generally worked on Monday and Tuesday, which were his usual days off, he was contacted by his supervisor and told that they were not going to need him and he could take Monday and Tuesday off. The supervisor told him that someone else would open the Branch.

. . .

The record indicates that the Company conducted an investigation of the February 24th Thomas incident by talking to several of the Carriers who were present in the Distribution Center that [m]orning. And, since Ms. Thomas did not appear at the hearing, there is nothing on the record with regard to her involvement in the incident.

DISCUSSION

. . .

As indicated, when the Company desires to discipline or discharge a bargaining unit employee with loss of pay, it had agreed not to do so without first giving the bargaining unit employee a Pre Discipline Hearing. And, such a hearing is required to take place within 24 hours, after the discharge or discipline has been brought to the attention of the employee. Obviously such a meeting is provided for so that all the facts and circumstances can be

reviewed before final disciplinary action is taken by the Company.

It is clear from the record in this case that the Company never "officially" contacted an officer or Business Agent of the Union, for the purpose of advising the Union about the incident involving the grievant or, for the purpose of having a Union official present at a Pre Disciplinary Hearing. The only evidence on the record, with regard to this obligation, was an "informal" exchange in the Company lunch room at some unspecified time. The substance of the discussion, as related by Company witnesses, was to the effect that they told the Union Recording Secretary that a bargaining unit employee, who was not paying Union dues, was being disciplined. There was no indication in the evidence presented by the Company that the name of the employee or the nature of the offense were discussed during that "informal" exchange. It would also appear that the Company was attempting to prejudice the grievant by highlighting the fact that the grievant was not a dues paying member of the bargaining unit. It is clear that the Company did not satisfy its obligation under the Agreement. The Company failed to schedule a hearing with the grievant within 24 hours after it advised the grievant that he was going to be disciplined. And, the Company also failed to "advise" a Union officer that it intended to take disciplinary action against a

bargaining unit employee within a specified 24 hours period.

. . .

It was also unclear from the testimony just exactly what happened that morning. One witness testified that he saw the grievant take Ms. Thomas out of the door by holding her hair. Another witness indicated that the grievant had his hand on the back of her neck but, that witness indicated that Ms. Thomas walked out the door by herself. . . . Based on the testimony of the three Company witnesses who observed what happened in the Distribution Center on February 24, 1996, it is clear that the entire incident did not last more than about a minute. And from the testimony it would appear that the grievant was not trying to abuse Ms. Thomas. No witness testified that he or she saw the grievant hit Ms. Thomas at any time while they were watching. There was also no evidence in the record which indicated that the grievant had hurt Ms. Thomas while he was escorting her from the building.

It would appear from all the evidence presented at the hearing that the grievant was not involved in workplace violence. In fact, based on the testimony of the grievant and Mr. Hamilton, it would appear that the person who might have been accused of workplace

violence was Ms. Thomas, who appeared to them to be intoxicated, abusive and somewhat out of control. According to the grievant this was the primary reason he was anxious to get Ms. Thomas out of the building as quickly as possible. He also indicated that he was afraid that Ms. Thomas might again try to harm him as she had done in November, 1995, in the parking area outside the Distribution Center. . . .

In the opinion of the arbitrator, the Company violated the Agreement when it failed to provide the grievant with a Pre Disciplinary Hearing prior to his discharge, And, the Company also violated the Agreement since it failed to demonstrate, based on all the evidence in the record, that the discharge of the grievant was for just cause.

AWARD

The grievance of Richard M. Elliott is sustained.

The Company is directed to immediately reinstate Mr. Elliott to his prior position with full seniority, full back pay, health benefits and all other benefits he would have received but for his unjustified discharge.

Section 301 of the Act vests in federal district courts jurisdiction over "[suits for violation of contracts between and

employer and a labor organization. 28 U.S.C. §185. While courts have interpreted this provision as providing for concurrent jurisdiction in the state and federal courts, it is federal law that governs the interpretation of collective bargaining agreements and the enforcement of arbitration awards under such contracts. *See, Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962); *Charles Dowd Sox Co. v. Courtney*, 368 U.S. 502 (1962).

National labor policy clearly favors resolution of labor contract disputes by private mechanism. Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. *See, Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).; *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960).[1] This Congressional policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play. *Hines*, 424 U.S. at 562 (citation omitted). For this reason, federal courts do not have plenary power to review the merits of an arbitration decision. *See, United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987); *Hines*, 424 U.S. at 563. Rather, the courts should defer to the agreed upon tribunal's interpretation of the contract "as long as the award draws its

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[1] The three 1960 *Steelworkers* decisions are commonly referred to as "the *Steelworkers* Trilogy".

essence from the bargaining agreement." *Wood v. International Brotherhood of Teamsters Local* 406, 807 F.2d 493, 500 (6th Cir. 1986), *cert. Denied,* 483 U.S. 1006 (1987) (citation omitted).

The federal court "cannot substitute its judgment or interpretation of a collective bargaining agreement for that of the arbitrator. The fact that a court might have applied a different interpretation to the collective bargaining agreement is no reason for setting aside the award." *Kroger Co. v. Teamster Local 661,* 380 F.2d 728, 732 (6th Cir. 1967), *citing, Enterprise Wheel, supra.* In the absence of fraud by the parties or dishonesty on the part of the arbitrator, a court may not overturn an arbitrator's findings of fact. *Misco,* 484 U.S. at 29. The courts do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. To resolve disputes about the application of a collective-bargaining agreement, an arbitrator must find facts and a court may not reject these findings simply because it disagrees with them." *Id.* Stated differently, the courts are prohibited from second-guessing the arbitrator's fact finding.

The federal courts do have the authority, however, to vacate an arbitration award in certain situations that "seriously undermine the integrity of the arbitral process." *Hines,* 424 U.S. at 567. An arbitration award is valid only if it "'draws its essence from the collective bargaining agreement,' and is not merely [the arbitrator's] own brand of industrial justice." *Misco,* 484 U.S. at 36, *quoting, Enterprise Wheel,* 363 U.S. at 597. The arbitrator is confined to the interpretation and application of the collective bargaining agreement, and although he may construe ambiguous contract language, he is

without authority to disregard or modify plain and unambiguous provisions. *Detroit Coil v. International, Association of Machinists & Aerospace Workers, Lodge No, 82,* 594 F.2d 575, 579 (6th Cir. 1979). There may be a departure from the essence of the agreement if

> (1) an award conflicts with express terms of the collective bargaining agreement, (2) an award imposes additional requirements that are not expressly provided in the agreement, (3) an award is without rational support or cannot be rationally derived from the terms of the agreement, and (4) an award is based on general considerations of fairness and equity instead of the precise terms of the agreement.

Cement Divisions, Nation Gypsum Co., v. United Steelworkers of America, 793 F.2d 759, 766 (6th Cir. 1986)(citation omitted).

Article 5, Section 3 and Article 11, Sections 3 and 4 of the CBA signed by the Union and DNI, all of which are quoted *supra,* are relevant to the present case. Article 5 defining management rights, expressly recognizes DNI's fight to, *inter alia,* suspend, discipline, and discharge for proper cause as well as the fight to publish and enforce reasonable plant rules. DNI's workplace rules, which DNI had posted pursuant to its fight to do so pursuant to the terms of the CBA, provide that DNI may discipline an employee for, *inter alia,* assault in the workplace. In addition, the workplace rules also provide that DNI may impose any form of discipline including, but not limited to, reprimand, suspension, and termination.

As noted above, in his recitation of his finding of fact, the arbitrator noted, "[a]t that point in time, the grievant came up behind Ms. Thomas, who was weaving back and forth and appeared out of control, and *grabbed her by the back of the neck* and started her toward the door." (emphasis supplied). In spite of his factual finding that Mr. Elliott had grabbed Ms. Thomas by the back of the neck, the arbitrator concluded that Mr. Elliott had not engagad in "workplace violence". Therein lies the flaw in the arbitrator's award.

There is absolutely no reference in the CBA or in DNI's workplace rules to "workplace violence". Rather, the workplace rules adopted by DNI clearly provide that "assault" may be grounds for discipline, up to and including discharge. The term "assault" is clear and unambiguous when given its plain and ordinary meaning and it needs no interpretation. Assault is a "violent physical or verbal attack". *Websters New Collegiate Dictionary* (1992 ed.).

The arbitrator's reference to "workplace violence" rather than to the contractual language of "assault" notwithstanding, the arbitrator clearly exceeded his authority in this case and his award simply does not draw its essence from the CBA.

Similar to the arbitrator in *Dobbs, Inc. v. Local No. 614, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 813 F.2d 85, 88 (6th Cir. 1987), "that the arbitrator was creating a contract of his own rather than applying the contract agreed to by the parties, becomes apparent from his discussion of the incident involving Mr. Elliott and Ms. Thomas: ". . . the entire incident did not last more than about a minute"; ". . . it

would appear that the grievant was not trying to abuse Ms. Thomas"; "No witness testified that he or she saw the grievant hit Ms. Thomas at any time while they were watching"; "There was also no evidence in the record which indicated that the grievant had hurt Ms. Thomas". The CBA nowhere provides that before DNI may discipline an employee for engaging in assault in the workplace, it must last for a particular period of time, that abuse and/or physical harm must have resulted, or that the assault requires that one person "hit" another. In essence, the arbitrator ignored his factual finding that Mr. Elliott had in fact "grabbed [Ms. Thomas] by the back of the neck". Stated differently, his conclusion is not supported by his own factual findings. In addition, his application of his own standard of "workplace violence" resulted in the creation of a contract of his own rather than an application of the contract agreed to by the parties.

The Court reaches a similar conclusion with respect to the arbitrator's award as it relates to the Pre Discipline Hearing issue. In addressing that issue, the arbitrator determined that, "It is clear from the record in this case that the Company never "officially" contacted an officer or Business Agent of the Union". Nevertheless, the arbitrator acknowledged "[t]he only evidence on the record with regard to this obligation was an "informal" exchange in the Company lunchroom at some unspecified time". In addition, the arbitrator found that there was a discussion between DNI personnel and the Union Recording Secretary that a bargaining unit employee was being disciplined. There is nothing in the CBA which references either "formal" or "informal" notice to the Union that DNI intends to discipline a bargaining unit employee. Yet, the arbitrator created an

obligation which did not exist in the CBA that any notice DNI gave to the Union be some nondescriptive "formal" notice. The arbitrator's imposition of a "formal" notice requirement is without warrant in the CBA.

On the basis of the arbitrator's own findings of fact and resultant award reinstating Mr. Elliott, this Court finds that the arbitrator exceeded his authority and that his award does not draw its essence from the CBA. Accordingly, there is no genuine issue of material fact and DNI is entitled to judgment as a matter of law.

Having reached that conclusion, the Court need not address the arguments of the parties with respect to sexual harassment, destruction of the arbitration hearing tape, public policy, and evidence and/or testimony outside the arbitrator's award. Additionally, the Union's claims, with respect to DNI's obligation to arbitrate the January 27, 1997, termination of Mr. Elliott's employment are moot.

In Case No. C-3-97-172, Defendant Dayton Newspapers Inc.'s Cross Motion for Summary Judgment, (Doc. 17), is GRANTED and PlaintiffTeamsters Local Union No. 957's Motion for Summary Judgment, (Doc. 4), is DENIED. Judgment shall be entered in favor of Defendant and against Plaintiff vacating the arbitrator's December 19, 1996, award and dismissing Plaintiff's Complaint with prejudice.

In Case No, C-3-97-194, judgment shall be entered in favor of Plaintiff Dayton Newspapers, Inc. and against Defendant Teamsters Local Union No. 957 vacating the arbitrator's December 19, 1996, award.

February 21, 1998.

/s/_____
Michael R. Merz
United States Magistrate Judge

APPENDIX D

AWARD OF ARBITRATOR

[Dated December 19, 1996]

FMCS No. 96-18616-6

IN THE MATTER OF THE
ARBITRATION BETWEEN:

DAYTON NEWSPAPER, INC.

and

TEAMSTERS LOCAL UNION
NO. 957 AFFILIATED WITH
IBT, AFL-CIO

DISCHARGE OF RICK ELLIOTT

APPEARANCES:

FOR COMPANY:
BRETT THURMAN, ESQ
DIRECTOR OF HUMAN RESOURCES
DAYTON NEWSPAPERS, INC.
4TH and LUDLOW STREET
DAYTON, OH 45402

FOR UNION:

JOHN R. DOLL, ESQ.
LOGOTHETIS, PENCE & DOLL
111 WEST FIRST ST., SUITE 1100
DAYTON, OH 45402-1156

This is an arbitration pursuant to Article 11 of the Collective Bargaining Agreement (Agreement) between the parties, effective December 27, 1992 through December 29, 1996.

A hearing was held on September 20th, 1996, at the Far East Distribution Branch, 820 Distribution Drive, Beavercreek, Ohio, at which time the parties were afforded an opportunity to present all relevant evidence and to examine and cross examine each witness. A post hearing brief was filed on behalf of the Union and the hearing was declared closed on receipt of the brief on October 17, 1996.

GRIEVANCE

GRIEVANCE: On the 13th of March 1996, 1 was wrongfully discharged. I wish to be reinstated in whole for all losses.
(JX #2 - Dated 3/19/96)

CONTRACT PROVISIONS

ARTICLE 11 GRIEVANCE AND ARBITRATION PROCEDURE

ISSUES

Did the Company adhere to the procedural due process requirements contained in the Agreement; if not, what is the appropriate remedy?

Was the Grievant discharged for just cause; if not, what is the appropriate remedy?

BACKGROUND

At the time of his discharge, the grievant was the Branch Captain at the Company's Beavercreek Distribution Branch. He had been employed by the Company since about 1986, and had worked as Branch Captain for about four (4) years.

As Branch Captain at the Beavercreek facility, the grievant was responsible for getting the papers ready for pickup by the carriers (who are independent contractors) so that the papers could be delivered in a timely manner. As Branch Captain, the grievant was not a supervisor, but, generally, he was the only Company employee at the facility when the carriers came to pick up the papers for delivery.

On February 24, 1996, the grievant reported for work at approximately 2:3 0 a. m. He and his family had worked at the facility the previous evening and he knew that there were still some inserts which had to be ready for the carriers when they arrived later that morning. The grievant also had to place inserts in some of the papers since he was aware that one of the carriers would not be available and that he (the grievant) would have to deliver the papers on that route.

While the grievant was performing his work on February 24, he was approached by Ms. Thomas. According to the evidence, Ms. Thomas, one of the carriers with whom the grievant had had a personal relationship, arrived at the facility sometime around 3:30 a.m. Since Ms. Thomas had called the grievant earlier that night claiming that he was not being faithful to her, he had started to bag her papers to have them ready for her when she arrived. Not long after she arrived, Ms. Thomas came and leaned over the Branch Captain's bench, where the grievant was stuffing and bagging the papers. However, when Ms. Thomas leaned over the Branch Captains bench that morning, it was clear to the grievant that she had been drinking.

When Ms. Thomas came to the Branch Captains's bench, the grievant was talking to Mr. Hamilton, one of the Carriers. Ms. Thomas told Mr. Hamilton, who was talking to the grievant, to "Shut the fuck up." She then started arguing with the grievant. Mr. Hamilton, who had been talking to the grievant, testified that Ms. Thomas was very angry and was talking in a very loud tone of voice. That the grievant told her to calm down, but she ignored him and continued talking at him in a very loud, angry manner. And, that the argument lasted for several minutes.

Because of her intoxicated condition, the grievant told Ms. Thomas that she should call her mother and have her come and help deliver the papers. Ms. Thomas did not follow the grievant's suggestion.

During the argument, the grievant told Ms Thomas to take her papers and leave. Ms. Thomas said that he had been unfaithful to her and that she knew how to make people

disappear. She indicated that she would make the grievant, his wife, and his kids disappear.

Ms. Thomas then picked up some of the inserts, which were on the bench waiting to be stuffed into the papers, and threw them on the floor. The grievant then took the papers, which he had prepared for Ms. Thomas, around the bench to give them to her. She yelled something to him and Mr. Hamilton. Ms. Thomas then went toward the first bench but continued to yell at the grievant and Mr. Hamilton.

At that point in time the grievant came up behind Ms. Thomas, who was weaving back and forth and appeared out of control, and grabbed her by the back of the neck and started her toward the door. When the grievant grabbed Ms. Thomas, he had most of her papers in a shopping cart and was trying to get Ms. Thomas and the papers out into her car in the parking lot. As they went past the first (last) bench before reaching the door, one of the Carriers, who was working at the bench closest to the door, asked the grievant what was he doing. The grievant told the Carrier that it was none of his business. The Carrier then told the grievant that since it was happening right in front of him it was his business.

After this brief exchange with the Carrier the grievant guided Ms. Thomas and her papers out the door. The grievant put the papers in her car and went back into the building to continue his work. Two of the Carriers, who were closest to the door, went out to the parking area shortly after the grievant and Ms. Thomas went past them. However, they did not see Ms. Thomas or the grievant in the parking area. The time involved, according to the testimony of the Carriers, was less then one minute. Except for Mr. Hamilton, none of the

other witnesses heard the angry exchange between Ms. Thomas and the grievant.

After Ms. Thomas left, the grievant went back to stuffing and bagging papers. Because one of the Carriers had called and indicated that he would not be in that morning, the grievant had to prepare the papers for that Carrier's route and then he had to deliver the route himself.

Before the grievant left to deliver the papers on the open route, Ms. Thomas returned to the building to pick up the rest of her papers. When Ms. Thomas came back the grievant was at the end of the building. One of the other Carriers saw Ms. Thomas and told the grievant that Ms. Thomas had her hand in her pocket and that she had a gun. Ms. Thomas approached the grievant and told him that she wanted a minute to talk to him. She wanted him to meet her later that morning at Perkins. He told her that he would meet her there in about 15 minutes. The grievant testified that Ms. Thomas was still drunk and that he was worried about her safety and the safety of the people in the branch. The grievant testified that he did not intend to meet Ms. Thomas later that morning but told her that he would in order to get her out of the building.

The grievant left the building shortly thereafter, after arranging for one of the employees in the building to keep her radio on. He wanted to be able to contact the employee if Ms. Thomas tried to do anything while he was delivering the route. He contacted the employee a number of times, but, did not have any further problems with Ms. Thomas that morning.

About 5:45 a.m. the grievant picked up his wife and kids. His wife had a route to deliver. When the grievant arrived back at the Branch, he tried to talk to one of the supervisors about what had happened. The supervisor came out and told the grievant that Ms. Thomas had called and asked that her route be put on alert. He indicated that Ms. Thomas was crying. The supervisor wanted to know what was wrong with her. The grievant said that he did not know. The supervisor suggested that he check on her. After his brief discussion with the supervisor, the grievant did not have any other discussion with him or Ms. Thomas that day.

Although the grievant generally worked on Monday and Tuesday, which were his usual days off, he was contacted by his supervisor and told that they were not going to need him and he could take Monday and Tuesday off. The supervisor told him that someone else would open the Branch.

One of the reasons why the grievant was anxious to get Ms. Thomas out of the building was because of what she did in February 1995. On that occasion, while he was sitting in his van in the parking area outside the distribution center, Ms. Thomas slashed the seat on which he was sitting and the head rest behind his head. He contacted the police but Ms. Thomas had already left the parking area. The police told him that since no one else was present at the time, it would be his word against her word. The police suggested that to protect himself, he should make a paper trail of activities of Ms. Thomas.

The record indicates that the Company conducted an investigation of the February 24th Thomas incident by talking to several of the Carriers who were present in the Distribution

Center that morning. And, since Ms. Thomas did not appear at the hearing, there is nothing on the record with regard to her involvement in the incident.

DISCUSSION

The Company contends that the action of the grievant constituted workplace violence and the Company has established a policy of Zero tolerance for such action. That what the three eyewitnesses described in their testimony was clearly workplace violence. And, there was no mitigating factor for the action of the grievant.

The Union contends that the Company failed to adhere to the procedural due process requirements contained in the Agreement. And, that the grievant was discharged without just cause. Article 11, Section 3, provides:

> The Company agrees not to discharge or discipline any employee without just cause. The Company shall have the right at any time to promulgate and enforce rules and regulations and all employees shall be subject to such rules and regulations. No member of the bargaining unit shall be discharged or disciplined with loss of pay without first being given a hearing. At such a hearing, an officer or Business Agent of the Union shall be present. The hearing shall take place within 24 hours after being brought to the attention of the employee. If an agreement is reached at such hearing, it shall be final and binding on all parties. (JX #1, p. 9)

As indicated, when the Company desires to discipline or discharge a bargaining unit employee with loss of pay, it has agreed not to do so without first giving the bargaining unit employee a Pre Discipline Hearing. And, such a hearing is required to take place within 24 hours, after the discharge or discipline has been brought to the attention of the employee. Obviously such a meeting is provided for so that all the facts and circumstances can be reviewed before final disciplinary action is taken by the Company.

It is clear from the record in this case that the Company never "officially" contacted an officer or Business Agent of the Union, for the purpose of advising the Union about the incident involving the grievant or, for the purpose of having a Union official present at a Pre Disciplinary Hearing. The only evidence on the record, with regard to this obligation, was an "informal" exchange in the Company lunch room at some unspecified time. The substance of the discussion, as related by Company witnesses, was to the effect that they told the Union Recording Secretary that a bargaining unit employee, who was not paying Union dues, was being disciplined. There was no indication in the evidence presented by the Company that the name of the employee or the nature of the offense were discussed during that "informal" exchange. It would also appear that the Company was attempting to prejudice the grievant by highlighting the fact that the grievant was not a dues paying member of the bargaining unit.

It is clear that the Company did not satisfy its obligation under the Agreement. The Company failed to schedule a hearing with the grievant within 24 hours after it advised the grievant that he was going to be disciplined. And, the Company also

failed to "advise" a Union officer that it intended to take disciplinary action against a bargaining unit employee within a specified 24 hours period.

With regard to the substance, not one of the Carriers who testified for the Company saw or heard anything prior to when they saw the grievant escorting Ms. Thomas from the building. They were not aware of what had occurred between Ms. Thomas and the grievant from the time Ms. Thomas arrived at the Distribution Center until the time they saw the grievant escorting her toward the door of the building. They did not hear the abusive language she addressed to the grievant and Mr. Hamilton at the Branch Captain's bench; they were not aware that she was intoxicated and that she was having trouble with her balance; they were not aware of the threat that she made to the grievant about doing away with him and his family; and, they were not aware of the incident involving Ms. Thomas and the grievant in November 1995.

It was also unclear from the testimony just exactly what happened that morning. One witness testified that he saw the grievant take Ms. Thomas out the door holding her by her hair. Another witness indicated that the grievant had his hand on the back of her neck but, that witness indicated that Ms. Thomas walked out the door by herself. The two Carriers who followed Ms. Thomas and the grievant out the door did not see Ms. Thomas in the parking area, although they indicated that they went out the door almost immediately after the grievant escorted Ms. Thomas out the same door. The parking area surrounding the building is not so large that they would not have been able to see Ms. Thomas if she was in the parking area. Based on the testimony of the three Company witness who observed what happened in the Distribution

Center on February 24, 1996, it is clear that the entire incident did not last more than about a minute. And from the testimony it would appear that the grievant was not trying to abuse Ms. Thomas. No witness testified that he or she saw the grievant hit Ms. Thomas at any time while they were watching. There was also no evidence in the record which indicated that the grievant had hurt Ms. Thomas while he was escorting her from the building.

It would appear from all the evidence presented at the hearing that the grievant was not involved in workplace violence. In fact, based on the testimony of the grievant and Mr. Hamilton, it would appear that the person who might have been accused of workplace violence was Ms. Thomas, who appeared to them to be intoxicated, abusive and somewhat out of control. According to the grievant this was the primary reason he was anxious to get Ms. Thomas out of the building as quickly as possible. He also indicated that he was afraid that Ms. Thomas might again try to harm him as she had done in November, 1995, in the parking area outside the Distribution Center. This was demonstrated by the fact that he arranged to be in radio contact with the Distribution Center while he was delivering papers that morning.

In the opinion of the arbitrator, the Company violated the Agreement when it failed to provide the grievant with a Pre Disciplinary Hearing prior to his discharge. And, the Company also violated the Agreement since it failed to demonstrate, based on all the evidence in the record, that the discharge of the grievant was for just cause.

AWARD

The grievance of Richard M. Elliott is sustained.

The Company is directed to immediately reinstate Mr. Elliott to his prior position with full seniority, full back pay, health benefits and all other benefits he would have received but for his unjustified discharge.

/s/_____
EDWARD P. GOGG
Arbitrator

DATED:
Cincinnati, OH
December 19, 1996